APPENDIX

JURISDICTION

(a) Appendix as to Federal Statutes

Sections 1346 (b), 2674 and 2671 of Title 28 U.S.C. (the reenactment of the Federal Tort Claims Act, 62 Stat. 933, 982, 983) provide in pertinent part:

Section 1346. *United States as defendant.*

* * *

(b) Subject to the provisions of Chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1 ,1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in *the same manner and to the same extent as a private individual* under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * *

Section 2671. *Definitions.*

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

* * *

"Employees of the government" includes officers or employees of any federal agency, members the military or naval forces of the United States, and persons

acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"*Acting within the scope of his office or employment,*" in the case of a member of the military or naval forces of the United States, means acting in "*line of duty.*"

Section 2679. *Exclusiveness of remedy.*

(b) The remedy by suit against the United States as provided by Sec. 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the government of any motor vehicle while acting within the scope of his office or employment, shall hereafter *be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.*

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of the department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States Attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding *commenced in a State Court shall be removed* without bond at any time before trial by the Attorney General to the district court of the United States for the district embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States the case shall be remanded to the State Court.

10 U.S.C., Sec. 501, Oath of Enlistment

"Each person enlistment in any armed forces shall take the following oath:

"I, . . . , do solemnly swear (or affirm) that I will support and defend the constitution of the United States against all enemies foreign and domestic. That I will bear true faith and allegiance to the same; that I will *obey the orders of the President of the United States and of the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice,* so help me God.

"This oath or affirmation must be taken before any commissioned officer of any armed force," as amended October 5, 1962.

In 10 U.S.C., Sec. 802, Article 2, of the Uniform Code of Military Justice (UCMJ), persons subject to this chapter:

"(1) *Members of a regular component of the armed forces, including* those awaiting discharge after expiration of their terms of enlistment. . . . "

10 U.S.C., Sec. 892, Article 92 of UCMJ:

"Failure to obey order or regulation:

Any person subject to this chapter who (1) violates or fails to obey any lawful general order or regulation (2) *having knowledge of any other lawful order issued by a member of the armed forces which it is his duty to obey, fails to obey the order,* or (3) is derelict in the performance of his duty,

Shall be punished as a court-martial may direct. August 10, 1956."

10 U.S.C., Sec. 911 (Art. 111 of UCMJ):

"Any person subject to this chapter who operates any vehicle while drunk or in a reckless or wanton manner shall be punished as a court-martial may direct. August 10, 1956."

10 U.S.C., Sec. 937, Article 137 of UCMJ, states:

"Articles to be explained:

"Sections 802, 803, 807-815, 825, 827, 831, 837, 838, 855, *877-934,* and 937-939 (Article 2, 3, 7-15, 25, 27, 31, 37, 38, 55 *77-134,* and 137-139 of this chapter shall be carefully explained to each enlisted member at the time of his entrance on active duty, or within six days thereafter. They shall be explained again after he has completed six months of active duty, and again at the time he re-enlists. A complete text of the Uniform Code of Military Justice and the regulations prescribed by the President thereunder shall be made available to any person on active duty, upon his request, for his personal examination. August 10, 1956."

10 U.S.C., Sec. 6011, Navy Regulations:

> "U.S. Navy Regulations shall be issued by the Secretary of the Navy with the approval of the President" . . . 1956. . . . these have force of law. *Cafeteria Workers v. McEhoy*, 367 U.S. 886, 81 S.Ct. 173, 6 L.Ed.2d 1230, rehearing denied."

(b) Appendix Excerpts from *U. S. v. Kennedy*, 230 F.2d 674 (1956? in 9 CCA)

The brief of appellee, Harold Kennedy, on page 4:

> "It is the position of the appellee that the pleadings in this case, in effect, admit that Sergeant Mayer, at the time of the accident, was an employee of the United States (R. 46); that the undisputed proof shows that at the time of the accident under Army regulations, his conduct was 'in line of duty' (R. 65); that it is admitted, under the pleadings and proof, that at the very moment of the accident Sergeant Mayer was, in point of fact, complying with the order to proceed, and was, in point of fact, proceeding, pursuant to the order to the Army Presidio at Monterey, California (R. 46, R. 50)."

The position with references to the record in said case are as follows: R. 46 in said case indicated, "Answer to Amended Complaint, paragraph 2"

> "In further answer to paragraph 3 of plaintiff's Amended Complaint, defendant admits all the allegations therein contained 'except that defendant specifically denies that Mayer was acting in the line of duty or within the scope of his employment and further denies it was necessary for Mayer to be traveling on January 23, 1954, in order to traverse the distance to the Presidio of Monterey, California."

Under R. 64:

"Q. Then, in this case, if Brigadier General Colbern, the Chief of Staff, or any of his subordinate officers, had decided to direct Sergeant Mayer to remain at Fort Lawton they would have had a right and power to do so, is that correct?

A. Yes, sir, they would have

Q. They would likewise have a right and power to cancel his leave at any time, is that correct?

A. Yes, sir.

Q. They would likewise have a power to direct him to go to any place in any different station in the United States other than the Presidio at Monterey had they (8) chosen to, is that not correct?

A. Yes.

Q. They would likewise have a right to tell him to proceed by air or by bicycle, had they chosen, is that not correct?

A. Yes, sir, that is correct.

Q. You are likewise familiar, are you not, Warrant Officer, that under the regulations of the United States Army that an enlisted staff sergeant while en route pursuant to travel orders is in fact in the line of duty within the contemplation of the regulations of the United States Army?

A. Yes, sir, in line of duty, speaking in line of duty.

Q. That is correct, is it not?

A. (Witness nods head affirmatively.)"

Under R. 50:

"The court further finds that on January 23, 1954, the defendant, United States of America, acting through its appropriate officers, could at all times con-

> trol Staff Sergeant Richard E. Mayer in his actions in the same manner that a private employer might have control over him, had Staff Sergeant Richard E. Mayer been in the employ of such private employer. That the travel herein involved was in the interest of the employer, the United States of America, and necessitated by the interest of the employer and not by the interest of Staff Sergeant Richard E. Mayer; that the work which the employer, the United States of America, desired Staff Sergeant Richard E. Mayer to perform, namely: to study the Chinese-Mandarin language—not for his benefit but for the benefit of the United States of America—created the necessity for the travel herein involved, and that under the laws of the State of Washington where this accident happened a private employer would be liable for similar acts committed by his employee."

The appellant government has set forth in their reply brief the exact reasoning in both their principal brief and in their reply brief that was brought out by the government in our case, to-wit: On page 6 of their reply brief in *Kennedy:*

> "In the instant case this is not true. Sergeant Mayer's work, either as an ordinary soldier or as the signalman he was, required only his presence at an Army post for the performance of ordinary soldier's or sigman's duties within the limits of the post, and, more specifically with respect to his newly assigned duties, his attendance at the Army Language School for the purpose of learning the Chinese language. The only travel required of him was this single, isolated trip for changing his permanent station; his assigned duties were thus not to commence until after he completed his travel. Appellee has cited no case where a private employer was held liable for the negligence of an

employee while driving his own car and while moving his residence from one city to another for the purpose of commencing a new job at a different branch office of the same employer. The courts of Washington have never imposed liability in such circumstances. On the contrary, it has been held that 'An act of the servant not done *in the execution of services for which he was engaged* cannot be regarded *as the act of the master.*' (Emphasis added.) *Roletto v. Department Stores Garage,* 30 Wn.2d 439, 442, 191 P.2d 875, 877 (1948).

"Moreover, as we emphasized in our main brief (pp. 3, 13, 19-20), at the time of the accident here involved Sergeant Mayer was not traveling from his old station to the new one and hence could not have been serving the interests of the United States. He was not, at the time, traveling under that part of his orders requiring a change of station but rather traveling under that part of his orders authorizing him to take leave. Mayer was thus in a leave, not duty, status and was driving his own car on a public highway near his home in Seattle. If he was in fact intending to go to Fort Lewis at that time, the most that could be said is that he was returning from his home to his former duty station. As the Washington courts have repeatedly held, travel between home and work is not within the scope of employment. *Bourus v. Hagen,* 192 Wash. 588, 74 P.2d 205 (1937).

"Appellee contends that the travel orders, as interpreted in the testimony of Warrant Officer Cichy, established incontrovertibly that Mayer's travel was in the Government's interest. But as explained in our main brief (pp. 20-21) the symbol 'TDN' appearing in those orders, although translatable as 'travel directed is necessary to comply with the order' (R. 64), is merely a term of art used to satisfy statutory prerequisites for compensating travel. It does not even

imply that the payee is an employee of the United States, much less that he is actively serving the Government's interest at the time of his travel or that his travel is within the scope of his assigned duties or employment. Moreover, the travel that was considered 'necessary' and for which Mayer was to be reimbursed by the United States was the travel between Fort Lewis and Monterey, not that between Seattle and Fort Lewis. At the time of the accident Mayer was therefore not engaging in the compensable travel and hence the part of his orders containing the symbol 'TDN' is inapplicable.

"Finally, appellee contends that the United States had full control over Sergeant Mayer's activities since he was subject to military discipline and could have been court-martialed had he failed to obey the lawful orders of a superior officer. This is undeniably true. The Government has, at all times, a potential right to control the conduct of members of the armed services *in general*, even when they are engaging in outside work for which they are compensated by another employer. But this is not enough to impose *respondeat superior* liability upon the United States, even if it be assumed that Mayer was acting in furtherance of the Government's interest. For the United States to be held liable, appellee must also have shown that the United States had the right to control the *particulars* of Mayer's conduct, that the vehicle was under the Government's control, or potentially under its control. *Nettleship* v. *Shipman*, 161 Wash. 292, 296 Pac. 1056 (1931). This appellee failed to establish. Appellee has nowhere shown that the United States could have controlled Mayer's operation of his personally owned property. The admitted facts show the contrary, especially since Mayer was on leave at the time of the accident. See our main brief, pp. 13-15, 18-20."

(c) Appendix Excerpts from Selected Government Publications

(1) Naval War College Review (VADM Smedberg of BuPers on "Retention"

As to the Chief of Naval Personnel, VADM W. R. Smedberg, III, USN, on 8 May, 1963, in an address to the Naval War College, Newport, Rhode Island, before selected senior officers stated:

> "All of our Navy lives, *people* are of top importance! The Bureau of Naval Personnel should properly be called the Bureau *for* Naval Personnel, even though it is hard, sometimes for all officers and men to feel that the Bureau is trying at all times to work for them. *Our policies* must *first* be in the *best interests of the Navy*—then in the best interests of the individuals. Often it is hard to bring the two into complete consonance. And it is rare that there is unanimous agreement on what really is in the best interest of the Navy or the individual. That in itself keeps life in the Bureau far from dull. . . ."
>
> "The principal challenge, I think, is the area of *retention.*"

(2) 1963 Congressional and Administrative News on the Purpose of 37 U.S.C., Sec. 203 Amendment—Public Law 88-132, Effective October 1, 1963; SECDEF McNamara and Legislative Background on "Uniformed Services Pay Act" of Increasing Pay of Armed Forces, Page 912:

> "The purpose of the proposed legislation is to provide added pay incentives *to improve the attraction and retention* of service members for career military service."

Page 915:

> "*Enlisted retention problem*

"The most crucial problem of enlisted retention in the Armed Forces is that of retaining men in technical skills beyond their initial term of service."

Page 916:

"*Emphasis of the bill*

"The purpose is to provide a cost of living increase of approximately 5% with significantly larger percentages in the enlisted and officer grades at the point of *retention* in order to assist in meeting the *enlisted* and officers *retention problems.*

Page 925; establish the family allowance where service exigencies prevent families from residing at or near duty stations:

"In order to receive this allowance, a military member must be either on a permanent change duty station with the movement of his dependents not authorized or . . .

Rationale for provision:

"The rationale for the family allowance is the enforced separation of servicemen from their families, causing additional household expenses where the member is absent for any extended period of time . . .

"As an example of enforced separation . . . during calendar year 1962, the 14 carriers of the U.S. fleet were absent from home ports for an average of 329 days out of 366 of the year."

Page 950; Department of Defense Recommendations to the President, January 25, 1963, among purposes:

"Provide incentive which will help service manning problems and thereby increase operational effectiveness."

Page 951:

"For example in both officers and enlisted compensation, the biggest percentage increases in the pay proposals are at the point where men are normally completing their first term of service.

"Substantial percentage increases for the grades normally held at that time should materially help to meet the *retention* problems in all the services."

Page 953:

"Our most serious retention problem relates to . . . increased training costs."

(3) Appendix on Defense Budget and Appropriation of United States as It Relates to the U.S. Navy

Colliers 1964 Encyclopedia Yearbook p. 693 on The Defense Budget for fiscal year ending 1963 p. 695, the Navy was allocated 30.4% of the budget of 47.2 billion dollars to be for Navy, including manpower of the Navy—325,000 marines—105,000 or 430,000 manpower; an average dollar of $35,927.00 for each sailor or marine on active duty including the vessels and shore station to keep him trained. Taking Navy Blue Book of Bobbs-Merrill, p. 193, and subtracting the $7.7 billion per year average upkeep and procurement for ships and aircraft and missiles (especially nuclear procurement), there is still approximately a cost of $15,400 per sailor on active duty (this includes his pay, food, clothing and upkeep). Cost for 18 years approximately $276,300 to train replacements for Grantham and Dela Cruz assuming average of 9 years training to Storekeeper First Class, or $726,700.00 including their share of ship and station upkeep and procurement.

DISTRICT COURT'S MEMORANDUM DECISION OF 27 SEPTEMBER, 1963, PER W. T. BEEKS, J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

PAULINE B. McCALL, as the Administrator of the Estate of Virgil C. McCall, Deceased, *Plaintiff*,

vs.

UNITED STATES OF AMERICA, *Defendant*.

No. 5868

MEMORANDUM DECISION

The death of Mr. Virgil C. McCall is one of the most tragic and needless losses of life that has ever come to the attention of the court, and the court is deeply sympathetic to his widow and children. Whether the United States must respond in damages for the admitted negligence which caused the death is a question, however, which must be decided not upon the basis of sympathy but upon the basis of legal principles.

To establish that Ray E. Grantham was at the time of the accident "acting within the scope of his employment," plaintiff relies upon factors which in the court's opinion are peculiar to military status as distinguished from the relationship of employer-employee. Plaintiff relies principally upon the fact that Grantham was a "regular" in the Navy serving under an enlistment contract of the broadest possible scope; was at all times subject to the provisions of the Uniform Code of Military Justice and other applicable service regulations; that he was at the time of said death engaged in transferring to a permanent change of duty

station, traveling under standard transfer orders authorizing the use of his private vehicle, and that his travel was of some benefit to the service for morale purposes. In short, plaintiff would subject the United States to liability because Grantham was at the time of the accident in the United States Navy.

It must also be noted, however, that Grantham's transfer was initiated by him purely for personal reasons; that he was required to make the change of duty station on his own leave time without the allowance of travel or proceed time; that the transfer was entirely without cost to the Government; that although his orders authorized the use of his own automobile, because of the kind of transfer involved such authorization was unnecessary, and that his duties as a storekeeper first class did not involve his driving or otherwise operating a motor vehicle.

It is the courts' opinion that under such circumstances Grantham was at the time of the accident subject to the "call of duty" but that he was not in the "line of duty" or acting "within the scope of his employment." Furthermore, the fact that while on leave he was considered to be in line of duty for certain special and enumerated purposes does not change this result.

The Federal Tort Claims Act, 28 U.S.C., Section 1346(b) indicates that liability thereunder is imposed for wrongful acts of Government employees acting within the scope of their employment under such circumstances as would impose liability upon the United States under local law if the United States were a private individual. In making such a determination, the court believes that the sound logic of the case of *Chapin v. United States,* 258 F.2d 465 (9th Cir.,

1958), and of the dissenting opinion in *Cooner v. United States,* 276 F.2d 220 (4th Cir., 1959), compel this court to disregard those factors which bear upon the military's governmental function as distinguished from its function as an employer.

The court is well aware that the Washington law of *respondeat superior* is controlling here. This in itself presents a somewhat anomalous situation since the exclusive jurisdiction of the Federal courts under the Federal Tort Claims Act precludes a state court from ever being faced with the same factual situation. Nevertheless, this court is convinced that the courts of the State of Washington would not impose liability in this case if it were stripped of all factors peculiar to the Navy's military or governmental function. No court has ever gone so far as to impose liability under facts similar to those involved in this case, that is, solely because the individual tort feasor was a member of the armed services at the time the tortious act was committed.

The court therefore finds that Granthar was not acting within the scope of his employment as a regular member of the United States Navy at the time of the accident here involved and judgment will be in favor of defendant with costs.

In the event an appeal be taken from the decision of this court and the Court of Appeals should hold this court to be in error in the conclusions it has reached, the court makes the following additional findings of fact to obviate the necessity of a remand and further trial:

1. That the decedent was not engaged in a joint venture at the time of his death.

2. That the decedent was not contributorily negligent. If the court be in error in this finding, the court further finds the second phase of the Doctrine of Last Clear Chance to be applicable, namely, that the negligence of the decedent had terminated and Ray E. Grantham could have discovered the peril of the decedent by the exercise of due car and failed to so do.

3. That at all times material Ray E. Grantham was not engaged on a "frolic of his own."

4. That at the time of the death of the decedent, he had a life expectancy of 25.27 years and at that time his surviving spouse, plaintiff herein, had a life expectancy of 32.18 years.

5. That the doctrine of *volenti non fit injuria* has no application to the facts of this case.

6. That the plaintiff, as the surviving spouse of said decedent, and the surviving children of said decedent have sustained damages in the following amounts:

Paulyne B. McCall, Wife	$90,896.80
Marianne Paulyne McCall, Daughter	25,000.00
Marcus Joseph McCall, Son	21,350.00
Monique Marie McCall, Daughter	17,450.00
Maxyne Marie Beatrice McCall, Daughter	15,900.00
Gregory Jan McCall, Son	3,409.50
Norris Lynn McCall, Son	2,108.00

Defendant's counsel shall prepare findings of fact, conclusions of law and decree of dismissal in accordance with the foregoing for presentation to the Court at 9:30 a.m., October 7, 1963. If the parties are able to agree upon the form and contents of the foregoing, presentation may be

made at any earlier date convenient to the submitting counsel and to the Court.

DATED this 27th day of September, 1963.

W. T. BEEKS
United States District Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS ENTERED ON 17 OCTOBER, 1963, AND JUDGMENT OF DISMISSAL OF 17 OCTOBER, 1963, OF W. T. BEEKS, DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

PAULYNE B. McCALL, as the Administratix of the Estate of VIRGIL C. McCALL, Deceased, *Plaintiff*,

vs.

UNITED STATES OF AMERICA, *Defendant*.

No. 5868

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come on regularly for trial on September 24, 1963, before the Honorable William T. Beeks, a Judge of the above entitled Court, the above entitled parties being represented by their respective counsel of record herein, and testimony having been given and exhibits introduced in evidence, and the Court thereupon having heard argument on the matter on September 25, 1963, and the Court having written a Memorandum Decision dated September 27, 1963, in the above entitled cause, the Court being fully advised in the premises does now make the following Findings of Fact:

1. That VIRGIL C. McCALL died on March 31, 1963, Sunday, at approximately 2:45 p.m. in King County, State of Washington.

2. That a collision occurred at approximately 2:45 p.m. on March 31, 1963, approximately 747 feet north, or 240 paces north, of the Pierce-King County line on U.S. Inter-

state No. 5 or Primary State Highway No. 1, commonly known as the Seattle-Tacoma Freeway, between a 1961 Falcon automobile, California license number DCL 716, driven by Ray E. Grantham, and a 1959 GMC pickup truck, Washington license number G-92479.

3. The 1961 Falcon automobile was a motor vehicle owned by said Ray E. Grantham.

4. The 1959 GMC pickup truck was owned by Norman W. Steele, Jr.

5. At the point of collision, the highway is a six-lane highway, being three lanes in a generally northerly direction and three lanes in a generally southerly direction.

6. Each of the highway lanes measures approximately 12 feet in width and are separated by marked dividing lines on said highway.

7. At the time of the collision, the weather was clear and the pavement was dry.

8. At the time and place of the collision, the 1959 GMC pickup truck was stopped on the approximately 9 foot 11 inch wide shoulder to the right of the north-bound lanes.

9. At the time and place of the collision, the 1961 Falcon automobile was proceeding in a generally northerly direction.

10. Prior to the collision, the decedent, VIRGIL C. MCCALL, had been a passenger in the 1959 GMC pickup truck and at the time of the collision, he was outside of said vehicle and to the rear of said truck on the shoulder of the highway.

11. VIRGIL C. MCCALL's death resulted from his being

struck by the said 1961 Falcon automobile, and his death was instantaneous with such impact.

12. At the time and place of the said collision, Ray E. Grantham negligently operated his said 1961 Falcon automobile which was the sole proximate cause of McCall's death.

13. At the time of the collision, decedent, VIRGIL C. MCCALL, was working in the Boeing Aircraft Company, Seattle, Washington, as a research engineer or chemist.

14. VIRGIL C. MCCALL was born on 10 March, 1915, was 48 years of age, married to PAULYNE B. MCCALL, who was born 26 February, 1923, and said Decedent, in 1957, earned $13,500.00 from Orchard Industries of Hastings, Michigan, as a research chemical engineer, and then came to Seattle in 1958 where he opened his own business known as QED, INC., and had wages of approximately $5,500, and in 1959, $6,424.00 from said Corporation, and from Everlite Corporation, $176.00, making a total of $6,600.00. In 1960 he disposed of said business and had earnings of $2,038.01 from QED, INC., $325.00 from Certified Manufacturing Company, and $6,138.88 from Boeing Aircraft Company, making a total of $8,502.29. In 1961 he earned $10,486.23 from the Boeing Aircraft Company, and in 1962 he earned $11,087.85.

15. During 1963 the decedent, VIRGIL C. MCCALL, received a merit raise on 1 January, 1963, and his salary was $11,679.20 per annum at his death.

16. In 1961 and 1962, VIRGIL C. MCCALL had received additional salary raises of 3½% per annum as part of general technical and professional wage increases at said Boeing

Aircraft Company and it is probable that decedent's earnings would increase in the future.

17. Plaintiff is the surviving widow and the Administratrix of the estate of VIRGIL C. MCCALL, probate number 171392 in the Superior Court of the State of Washington for King County, and has been authorized by court order to bring this action on behalf of herself and other statutory beneficiaries, and has paid the following reasonable expenses for the funeral and handling of decedent's remains:

A. Booth-Ashmore Funeral Parlor	$551.80
B. Green Harrell Funeral Parlor	345.00

18. At the time of the commencement of this action, plaintiff was an alien of the United States of America and a citizen of Canada, but became a naturalized citizen on July 22 ,1963.

19. Plaintiff married the decedent on April 28 ,1951. At the time of his death, VIRGIL C. MCCALL was legally obligated to pay to Norris McCall and Gregory McCall, two sons by a prior marriage, the sum of $50.00 per month per child, pursuant to a Decree of Divorce.

20. At the time of the collision, Ray E. Grantham was an enlisted man with a rating of SK1 in the United States Navy.

21. Grantham had enlisted for a period of six years on April 14 ,1961, and at all times material was an employee of the government as defined in 28 USCA, Section 2671.

22. At the time of the collision, Grantham was in uniform and had in his possession the original and copies of his orders, Standard Transfer Order No. 26-63, and these were received by him on the USS CORAL SEA, CVA 43 at

Alameda, California, on the 29th day of March, 1963. He spent the evening of March 29, 1963, at Hayward, California, and left for Washington at approximately 9 a.m. on March 30, 1963, and he reported on Monday, April 1, 1963, on board the USS BON HOMME RICHARD, CVA 31, at Bremerton, Washington, at approximately 6:30 p.m.

23. Standard Transfer Order No. 26-63 of Grantham erroneously and mistakenly allowed travel and proceed time and erroneously and mistakenly designated the time of reporting as April 21 ,1963. In truth and in fact no travel and proceed time were allowed in connection with these orders and Grantham was to report not later than April 13, 1963.

24. Said orders were further in error in that the license number designated in the orders was not correct. In addition although said Orders authorized use of Grantham's own automobile, because of the kind of transfer involved such authorization was unnecessary.

25. The names, dates of birth and relationship of decedent's dependents are as follows: PAULYNE B. MCCALL, surviving spouse, born February 26, 1923, housewife; MAXYNE MARIE BEATRICE MCCALL, born December 19, 1951, daughter, MONIQUE MARIE CATHERINE MCCALL, born October 21, 1954, daughter; MARCUS JOSEPH NEWELL MCCALL, born February 6, 1959, son; MARIANNE PAULYNE MCCALL, born June 29, 1963, daughter, NORRIS LYNN MCCALL, born January 19, 1946, and GREGORY JAN MCCALL, born August 2, 1948, sons partially dependent.

26. In addition to the foregoing, McCall has a married daughter who cannot be shown on such financially dependent, to wit: HELEN MAE BATTEIGER, born in 1938.

27. Grantham made a letter request for an exchange of duty which was forwarded recommending approval by the Commanding Officers of the USS BON HOMME RICHARD, CVA 31 and USS CORAL SEA, CVA 43.

28. The law of Washington is applicable to all substantive issues of this case.

29. That as to the amounts of monetary contributions made by said decedent to his dependents financially, as to his two sons, NORRIS LYNN McCALL and GREGORY JAN McCALL, both of Belleville, Illinois, and in the custody of their natural mother, Helen McCall, he had failed for some periods of time for five years immediately preceding the accident to pay the child support payments which had been ordered in Cause No. 1082 between Helen McCall and said decedent pursuant to the order of the Circuit Court of Warrick County in the State of Indiana, entered on the 13th day of September, 1949, which was in the amount of $50.00 per month per child, and that he did not pay any amounts in 1958 and 1959 due to his relocation in the Seattle area and his own business. However, in 1959, he did make the mother of said children the beneficiary of the life insurance policy handled out of the Seattle office of the Prudential Insurance Company, being policy No. 12759168, the face value of this was $5,000.00 and the accidental amount of which was $10,000.00. This amount has actually been paid to Helen J. McCall as their guardian and custodian. In June or July of 1960, the decedent has paid $50.00 each and every month thereafter until the accident date, thus making the total of $1,800.00 paid to his two sons during the past five years, excluding the consideration as to the premiums of the insurance policy. He was

approximately $3,000.00 in arrears in child payment at his death.

30. Grantham was on leave status at the time of the accident. His leave commenced March 30, 1963 and terminated April 1, 1963.

31. During said period of leave Grantham was entitled to his regular pay but he was not entitled to be paid for travel and proceed time.

32. Grantham's transfer was initiated by him for purely personal reasons.

33. Grantham's duties as a Storekeeper 1st Class did not involve his driving or otherwise operating a motor vehicle.

34. As an employer the United States had no control or right to control Grantham at the time and place of the accident other than to terminate his leave and call him to active duty.

35. Grantham's transfer was initiated and executed pursuant to the provisions of Chapter 16.2 of the Enlisted Transfer Manual, NavPers 15909A (Revised 22 March, 1960).

36. Grantham was at all times subject to the provisions of the Uniform Code of Military Justice.

37. Grantham's exchange of duty with Pedro Dela Cruz was of some benefit to the military service for morale purposes which, in turn, aided the retention of qualified and experienced career personnel.

38. Other than as stated in Finding number 37, Grantham's exchange of duty was not necessary to the military service.

39. Grantham personally submitted his request for an exchange of duty with Pedro Dela Cruz to EPDOPAC in San Diego and this request was granted pursuant to applicable Navy regulations.

40. Grantham realized that the provisions of his orders relating to travel time and proceed time and date of reporting were in error the first time he looked at said orders when he reported on board the USS BON HOMME RICHARD on April 1, 1963.

41. Grantham's orders provided for 15 days' leave to travel between Alameda, California and Bremerton, Washington.

42. Grantham was not acting within the scope of his employment at the time and place of the collision.

43. The decedent was not engaged in a joint venture at the time of his death.

44. The decedent was not guilty of contributory negligence.

45. I the court be in error in findings 12 and 44 Grantham had the last clear chance to avoid the accident. He could have discovered the peril of the decedent by the exercise of due care and failed to do so.

46. If the court be in error in finding that Grantham was not within the scope of his employment for the aforementioned reasons, the court finds that Grantham was not engaged in a "frolic of his own" in traveling from Tacoma to Seattle rather than taking the Narrows Bridge from Tacoma to Bremerton, and at all times material there was no deviation by him.

47. At the time of the death of decedent he had a life

expectancy of 25.27 years and at that time his surviving spouse had a life expectancy of 32.18 years.

48. The doctrine of *volenti non fit injuria* had no application to the facts of this case.

49. Plaintiff, as the surviving spouse of the decedent and the surviving children of said decedent have sustained damages in the following amounts:

Pauyne B. McCall, Wife	$90,896.80
Marianne Paulyne McCall, Daughter	25,000.00
Marcus Joseph McCall, Son	21,350.00
Monique Marie McCall, Daughter	17,450.00
Maxyne Marie Beatrice McCall, Daughter	15,900.00
Gregory Jan McCall, Son	3,409.50
Norris Lynn McCall, Son	2,108.00

CONCLUSIONS OF LAW

1. Grantham was not within the scope of his employment at the time and place of the collision.

2. The fact that while on leave Grantham was considered to be in the line of duty for certain special and enumerated purposes does not place him in the *"line of duty"* or acting "within the scope of his employment" within the terms of the Federal Tort Claims Act.

3. Factors which bear solely upon the military's governmental function as distinguished from its function as an employer must be disregarded herein.

4. The Complaint herein should be dismissed with prejudice with the defendants to recover taxable costs against plaintiff as provided by law.

DONE IN OPEN COURT this 17th day of October, 1963.

WM T. BEEKS
United States District Judge

Presented and Approved by:
ROBERT C. WILLIAMS
Of Attorney for Defendant

Approved as to Form only:
HORTON H. SMITH
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGON
NORTHERN DIVISION

PAULYNE B. McCALL as the Administrator of the Estate of VIRGIL C. McCALL, Deceased, *Plaintiff*,
vs.
UNITED STATES OF AMERICA, *Defendant*.
} CIVIL No. 5868

JUDGMENT OF DISMISSAL

THIS MATTER having come on regularly for trial on September 24, 1963, before the Honorable William T. Beeks, a Judge of the above-entitled court, the above-entitled parties being represented by their respective counsel of record herein, and testimony having been given and exhibits introduced in evidence and final argument having been made by respective counsel for the parties, and the court having written a Memorandum Decision in the above-entitled cause and having heretofore entered its Findings of Fact and Conclusions of Law herein, and the court being fully advised in the premises, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Complaint herein be and the same is hereby dismissed in its entirety with prejudice.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants shall have and recover judgment against plaintiff for their taxable costs herein in the amount of $33.96 as provided by law.

DONE IN OPEN COURT this 17th day of October, 1963.

W. BEEKS
United States District Judge

Presented and Approved by:
ROBERT C. WILLIAMS
Attorney for Defendant

Approved as to Form only:
HORTON SMITH
Attorney for Plaintiff

OPINION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAULYNE B. MCCALL, as the Administratrix of the Estate of VIRGIL C. McCALL, Deceased, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 19,164

[November 25, 1964]

On Appeal from the United States District Court for the Western District of Washington, Northern Division

Before: HAMLIN, JERTBERG and DUNIWAY, Circuit Judges.

JERTBERG, Circuit Judge:

Appellant appeals from a judgment of dismissal entered in favor of the United States in an action brought against the United States in the District Court for the Western District of Washington, Northern Division, pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. Jurisdiction of the District Court was based on 28 U.S.C. § 2671, et seq. This court has jurisdiction under 28 U.S.C. § 1291.

The facts are not in dispute. On March 31, 1963, one Ray E. Grantham, an enlisted man with a rating of Storekeeper 1st Class, in the United States Navy, while traveling in his own automobile from his home in Hayward, California, to Bremerton, Washington, struck and killed one Virgil C. McCall who was then engaged in changing a tire on the shoulder of the Tacoma-Seattle Freeway in the State of Washington. The United States has not, and does not, con-

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test the fact that the negligence of Grantham in the control and operation of his automobile proximately contributed to the cause of McCall's death.

Following trial to the District Court, the court found as a fact, and concluded as a matter of law, that Grantham was not acting within the scope of his employment as an employee of the United States at the time and place of the accident which resulted in McCall's death, and accordingly entered judgment dismissing appellant's action with prejudice.

The record discloses that Grantham had enlisted in the United States Navy for a period of six years on April 4, 1961, and that in the early part of 1963 he was serving on board the USS CORAL SEA, moored at Alameda, California. He was approached by a shipmate who told him of a Storekeeper 1st Class, one Pedro Dela Cruz, then serving aboard the USS BON HOMME RICHARD, docked at Bremerton, Washington, who desired duty aboard the USS CORAL SEA for personal reasons. Grantham, on the other hand, wished to transfer to the USS BON HOMME RICHARD because the USS CORAL SEA was going overseas and he desired to remain closer to his family. After learning of the possibility for the exchange, Grantham initiated a special request through his division officer requesting an exchange of duty with Dela Cruz pursuant to the Navy's "no cost transfer" or "SWAP" program. That program is defined in the Navy's Enlisted Transfer Manual, Chapter 16, as follows:

"16.11 Definition

"A no cost transfer is defined as a personnel movement authorized for the convenience of the individual involved, and effected at no expense to the Government, Government transportation for the man, his de-

> pendents and household effects is not authorized, nor is payment of a dislocation allowance. Such transfers must be effected during periods of leave (except for hospital patients) and no proceed time or travel time is authorized."

As required by Chapter 16 of the Enlisted Transfer Manual, Grantham's letter request contained, in part, this statement: "I understand that if my transfer in exchange is authorized it will be as a result of my own request for my personal convenience, and it is to be made at no cost to the Government."

The requests of Grantham and Dela Cruz were approved and each was issued a transfer order. The transfer order issued to Grantham granted him fifteen days leave, at the expiration of which he was to report on board the USS BON HOMME RICHARD. The transfer order contained the following typewritten caveat:

> "NO EXPENSE TO THE GOVT IS AUTHORIZED IN CONNECTION WITH THESE ORD[ER]S, IN CASE YOU DO NOT DESIRE TO BEAR THE EXPENSE YOU WILL REGARD THIS AUTHORIZATION AS REVOKED."

It was stipulated that no proceed or travel time was authorized or allowed in the transfer. The transfer order authorized the use of Grantham's own automobile, but the authorization was unnecessary and meaningless because Grantham was on leave. He testified that he could have traveled by any means which he desired. After logging off the USS CORAL SEA on March 29, 1963, Grantham spent the night at his home in Hayward, California, and then left the following day in his privately owned automobile for Bremerton, Washington. While Grantham's leave was to expire on April 13, 1963, he reported to the BON HOMME

RICHARD at Bremerton, Washington, on April 1, 1963, thus taking only a portion of the leave to which he was entitled.

The District Court found *inter alia* the following facts:

1. Grantham was on leave status at the time of the accident. His leave commenced March 30, 1963 and terminated April 1, 1963.

2. During said period of leave Grantham was entitled to his regular pay, but he was not entitled to any pay for travel and proceed time.

3. Grantham's transfer was initiated by him for purely personal reasons.

4. Grantham's duties as a Storekeeper 1st Class did not involve his driving or otherwise operating a motor vehicle.

5. Grantham was at all times subject to the provisions of the Uniform Code of Military Justice.

6. Grantham's exchange of duty with Pedro Dela Cruz was of some benefit to the military service for morale purposes which, in return, aided in the retention of qualified and experienced career personnel.

7. Grantham's orders provided for fifteen days' leave to travel between Alameda, California and Bremerton, Washington.

8. Said orders were further in error in that the license number designated in the orders was not correct. In addition although said Orders authorized use of Grantham's own automobile, because of the kind of transfer involved such authorization was unnecessary.

9. Grantham was not acting within the scope of his employment at the time and place of the collision.

28 U.S.C. § 1346(b) provides, in relevant part, as follows:

> ". . . [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. § 2671, under the heading "Definitions," in relevant part provides:

> "As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term--
>
> " ° ° ° .
>
> " 'Employee of the government' includes . . . , members of the military or naval forces of the United States, . . .
>
> " 'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States means acting in line of duty."

28 U.S.C. § 2674, in relevant part provides:

> "Liability of United States
>
> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."
>
> " ° ° ° ."

Among the admitted facts appearing in the pretrial conference order is that Grantham was an employee of the United States at the time of the accident. It is to be noted that 28 U.S.C. § 1346 (b), in substance provides that the District Court shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, for injury or loss of property or personal injury or death caused by the negligence or wrongful act of any employee of the Government "while acting within the scope of his employment," and that 28 U.S.C. § 2671 provides that "acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States means "acting in line of duty."

However, as stated in *Merritt v. United States*, 332 F.2d 397 (1st Cir. 1964), at page 398:

> "It is settled that the phrase 'acting in line of duty,' while having a military sound, and, apparently, a different meaning in connection with benefit claims of military personnel against the government with respect to the Tort Claims Act merely invokes the state law of respondeat superior. Williams v. United States, 1955, 350 U.S. 857, 76 S.Ct. 100, 100 L.Ed. 761; United States v. Taylor, 6 Cir., 1956, 236 F.2d 649, 74 A.L.R. 2d 860, cert. dismissed, 355 U.S. 801, 78 S.Ct. 6, 2 L.Ed.2d 19; United States v. Hainline, 10 Cir., 1963, 315 F.2d 153, cert. den. 375 U.S. 895, 84 S.Ct. 172, 11 L.Ed.2d 124."

In accord see *United States v. Campbell* (5th Cir. 1949) 172 F.2d 500, cert. den. 337 U.S. 957; and *Chapin v. United States* (9th Cir. 1958) 258 F.2d 465, cert. den. 359 U.S. 924.

In the last cited case we stated, at page 468:

> "We must decide whether the peculiar status of a member of the armed services has any effect on the va-

lidity of the general rules already noted; or whether, for the purposes of *respondeat superior*, his status is to be considered similar to that of any private employee. We discern no basis in the statute waiving sovereign immunity nor in logic for making a distinction which would extend the scope and application of the doctrine of *respondeat superior* beyond that traditionally applied to private employers simply because the federal government in its military capacity finds itself in the role of employer." [Footnote omitted]

28 U.S.C. § 2674 imposes liability upon the United States respecting the provisions of the Federal Tort Claims Act, relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. Under 28 U.S.C. § 1346(b) the determination of liability must be made "in accordance with the law of the place where the act or omission occurred." In this case the determination of whether Grantham was acting within the scope of his employment at the time and place of the accident must be made under the law of the State of Washington. *Williams v. United States*, 350 U.S. 857 (1955).

Because exclusive jurisdiction is conferred on the federal district courts by 28 U.S.C. § 1346, the state courts are precluded from passing upon the peculiar status of a member of the Armed Forces of the United States in the context of an action brought by a third person against the United States, based upon a wrongful tort committed by a member of the Armed Forces to the property or person of such third person. As stated in *Chapin v. United States*, *supra*, at page 468:

> "Other federal courts, in transfer cases, under the applicable state law, have faced this issue and have failed to draw a distinction based upon the unique relationship of a soldier to his employer.[8]"

Footnote 8 to which the text refers, reads as follows:

["[8]United States v. Sharpe, 4 Cir., 1951, 189 F.2d 239; United States v. Eleazer, 4 Cir., 1949, 177 F.2d 914; Noe v. United States, D.C.E.D.Tenn. 1956, 136 F. Supp. 639; cf. Jozwiak v. United States, D.C.S.D. Ohio 1954, 123 F.Supp. 65."]

Analogizing the case before us to one of private employment, we have an employer who conducts the same type of business at two different locations – one location at Alameda, California, and one location at Bremerton, Washington, and who has a policy of permitting, under certain conditions, the transfer of an employee from one location to another. We have an office employee at Alameda, California, whose duties do not require or involve the operation of a motor vehicle, who initiates a request for transfer, for reasons personal to him, from the place of business of his employer at Alameda, California, to the place of business of the employer at Bremerton, Washington. The employer approves the request for transfer provided that the transfer of the employee from Alameda, California, to Bremerton, Washington, be made solely at the expense of the employee and without cost to the employer, and be accomplished during the two weeks paid vacation of the employee, and by such means of transportation as the employee may choose. The employee chooses to travel by means of his own automobile, and while traveling on his way to Bremerton, Washington, during the paid vacation period, negligently operates his automobile and causes death to a third person.

We believe under *United States v. Campbell, supra,* and *Chapin v. United States, supra,* that the case before us must be thus analogized in order to determine whether, under the law of the State of Washington, Grantham was

within the scope of his employment by the United States at the time and place of the accident.

We have reviewed many decisions of the Supreme Court of Washington involving the doctrine of *respondeat superior* in a non-military context, and have found no case which would impose liability on the employer in this case when this case is stripped of its military overtones, such as, that Grantham during his leave was subject to call to duty, and subject to the provisions of the Uniform Code of Military Justice and other applicable service regulations.

We have culled from a review of many decisions of the Supreme Court of Washington, involving the doctrine of *respondeat superior*, the following quotations which we believe to be a fair representations of the tests which have been applied by that court in solving the scope of employment issue in non-military cases where employee and employer relationship is admitted as it is in the instant case.

1. "(1) Conduct of a servant is within the scope of employment if, but only if:

   "(a) It is of the kind he is employed to perform. ° ° °

   "(b) It occurs substantially within the authorized time and space limits. ° ° °

   "(c) It is actuated, at least in part, by a purpose to serve the master."

   Brazier v. Betts, 8 Wn.2d 549, 561, 113 P.2d 34, 39 (1941), citing Restatement, Agency, § 2228, p. 505.

2. "The test for determining whether an employee is, at a given time, in the course of his employment, is whether the employee was, at the time, engaged in the performance of the duties required of him by his con-

tract of employment or by the specific direction of his employer, or, as sometimes stated, whether he was engaged at the time in the furtherance of the employer's interest."

Roletto v. Department Stores Garage Co., 30 Wn.2d 439, 443, 191 P.2d 875, 877 (1948); *Greene v. St. Paul-Mercury Indemnity Co.*, 51 Wn.2d 569, 573, 320 P.2d 311, 314 (1958).

3. "It is the established rule in this jurisdiction that where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master."

Murray v. Kauffman Buick Co., 197 Wash. 469, 473-74, 85 P.2d 1061, 1063 (1938); *Carmin v. Port of Seattle*, 10 Wn.2d 139, 154, 116 P.2d 338, 344 (1941).

4. "The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act otherwise is within the service."

Forsberg v. Tevis, 191 Wash. 355, 358, 71 P.2d 358, 359 (1937); *Murray v. Kauffman Buick Co., supra*, 195 Wash. at 473, 85 P.2d at 1063.

5. "The act of the servant must thus have been in the furtherance of some purpose of his own, rather than the furtherance of some purpose of the master, and the rule is general that, when the servant acts for pur-

poses of his own, not for the purposes of his master, and thereby causes an injury to another, the act is not within the scope of his employment and the master cannot be held liable therefor."

Estes v. Brewer Cigar Co., 156 Wash. 465, 473, 287 P. 36, 40 (1930); *Brazier v. Betts, supra*, 8 Wn.2d at 556, 113 P.2d at 37.

6. "If the work of the employee creates the necessity for travel, he may be in the course of his employment though he is serving at the same time some purpose of his own; but if the work for the employer had no part in creating the necessity for travel, and the journey would have been made though no business was transacted for the employer, or would not have been made if the private purpose was abandoned, the journey may be regarded as personal and there would be no employer liability."

McNew v. Puget Sound Pulp and Timber Co., 37 Wn. 2d 495, 499, 224 P.2d 627, 630 (1950).

It is to be noted from the above citations that the conduct of the employee, to be within the scope of employment, must be "of the kind that he is employed to perform," "required of him by his contract of employment," by the direction of his employer," or, in part at least, in the furtherance of the employer's interest or business.

Clearly, the driving of an automobile by Grantham was not the kind of work that he was employed by the United States to perform, nor required by his contract of employment, nor by the direction of the United States. Equally clear is the fact that the driving of the automobile was not in furtherance of the interests or business of the United States. The fact that the "SWAP" program improves morale

of those in the Navy and aids in the retention of qualified career personnel results from the program itself.

We have considered appellant's argument based on the doctrine of *qui facit per alium facit per se,* and find no merit therein when viewed in the context of this case.

We have reviewed our decision in *United States v. Kennedy,* 230 F.2d 674 (9th Cir. 1956), which case, as the instant case, arose in the State of Washington. In *Chapin v. United States, supra,* footnote 7, page 468, the *Kennedy* decision was distinguished on the ground that the issue of scope of employment was conceded by the United States and that the issue was given no consideration by this court.

Appellant asserts that in fact the United States did not, in *Kennedy,* admit that the Sergeant there involved was acting within the scope of his employment, although the opinion states that such an admission was made. Hence, says appellant, the distinction of *Kennedy* that is made in *Chapin* is not valid. This would get us into the old argument as to whether a decision is authority for what the record required the court to decide, or only for what the opinion purports to decide. We need not enter that jurisprudential quagmire. Assuming, as urged by appellant, that the United States did not, in *Kennedy,* admit that the Sergeant there involved was acting within the scope of his employment, nevertheless, appellant's reliance on *Kennedy* is misplaced since the facts in *Kennedy* are clearly distinguishable from the controlling facts in the instant case.

The judgment of the district court is affirmed.